IN THE
MISSOURI SUPREME COURT

STATE EX REL. LEE S. FRANCIS,	)	
	)	
Relator,	)	
	)	
vs.	)	No. SC 85648
	)	
THE HONORABLE	)	
WARREN L. MCELWAIN,	)	
CIRCUIT JUDGE	)	
43RD JUDICIAL CIRCUIT,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF DEKALB COUNTY, MISSOURI
43RD JUDICIAL CIRCUIT, DIVISION 1
THE HONORABLE WARREN L. MCELWAIN, JUDGE

RELATOR'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This case involves a writ of mandamus to require Respondent, the Honorable Warren McElwain, to direct the clerk of Dekalb County to file Relator's state habeas corpus petition without payment of filing fees of $135.00 under the Prison Litigation Reform Act (hereinafter PLRA), § 506.369, RSMo 2000.[1] This Court has jurisdiction on an original writ case pursuant to Rules 84.22 and 84.23.

[1] All further statutory references are to RSMo 2000, unless indicated otherwise.

STATEMENT OF FACTS

Relator was originally charged in Jackson County with first degree murder and armed criminal action in Case No. CR93-1990 (See Relator's Exhibit 1, subexhibit C). He was convicted after a jury trial on said charges in Jackson County, and sentenced on July 25, 1994, to life without probation or parole for first degree murder, and a consecutive life sentence for armed criminal action (Relator's Exhibit 1, subexhibit A). Despite the filing of an extensive new trial motion by Relator's counsel (Relator's Exhibit 1, subexhibit D), no Notice of Appeal was ever filed by counsel, and Relator has not received an appeal from his underlying Jackson County criminal conviction (See Relator's Exhibit 1, subexhibit B). Subsequently, Relator contacted undersigned counsel requesting assistance, and counsel filed a Writ of Habeas Corpus in Dekalb County, Relator's Exhibit 1, on March 26, 2003. In this Writ of Habeas Corpus, Relator requested a remand for resentencing to start the clock over for purposes of filing a Notice of Appeal, pursuant to this Court's decision in *State ex rel. Meier v. Stubblefield*, 97 S.W.3d 476 (Mo. banc 2003).

Relator petitioned the court of Dekalb County in forma pauperis, Relator's Exhibit 2, but the court ordered Relator to pay the full amount of filing fee of $135.00, pursuant to Section 506.369, or his case was subject to being dismissed (Relator's Exhibit 3).

Relator first sought a Writ of Mandamus in the Western District Court of Appeals to require Respondent McElwain to order the clerk to file the Petition for

Writ of Habeas Corpus in forma pauperis without payment of any fees, pursuant to Rule 84.02(a), and that court denied the Writ of Mandamus (Relator's Exhibit 4). Relator then refilled the Writ of Mandamus in this Court.

POINTS RELIED ON

I.

A Writ of Mandamus should issue to compel the filing of Relator's petition for Habeas Corpus Relief without payment of filing fees pursuant to the PLRA because the PLRA should not apply to writs, such as habeas corpus, which challenge the validity of judgment and sentence in that the purpose of the act was to place an incarcerated prisoner in a similar posture to a non-incarcerated person seeking monetary relief against a defendant, and reduce or even prevent the filing of frivolous litigation designed to harass or vex the named defendant, as well as prevent subjecting the defendant to the range of discovery provisions in a civil case.

State ex rel. Scott v. Roper, 680 S.W.2d 757 (Mo. banc 1985);

Naddi v. Hill, 106 F.3d 275 (9th Cir. 1997); and

State ex rel. Meier v. Stubblefield, 97 S.W.3d 476 (Mo. banc 2003).

II.

A Writ of Mandamus should issue and require Respondent to direct the clerk to file the Relator's petition for Writ of Habeas Corpus in Dekalb County without requirement of payment of full filing fees under the PLRA, because Section 514.040.3 should allow Relator to proceed without paying full filing fees or other costs in that Relator is represented by the Public Defender, and an organization funded in whole by the general assembly to provide legal services to indigent persons, and Relator has been determined by the Public Defender to be eligible for its services as a poor person, and an affidavit and motion certifying Relator's indigence has been filed before Respondent.

State ex rel. Wecker v. Ohmer, 105 S.W.3d 511 (Mo. App., E.D. 2003);

County of Jefferson v. Quik Trip Corporation, 912 S.W.2d 487 (Mo. banc 1995);

In re Meier v. Stubblefield, 97 S.W.3d 476 (Mo. banc 2003); and

State ex rel. Marshall v. Blaeuer, 709 S.W.2d 111 (Mo. banc 1986).

ARGUMENT

I.

A Writ of Mandamus should issue to compel the filing of Relator's petition for Habeas Corpus Relief without payment of filing fees pursuant to the PLRA because the PLRA should not apply to writs, such as habeas corpus, which challenge the validity of judgment and sentence in that the purpose of the act was to place an incarcerated prisoner in a similar posture to a non-incarcerated person seeking monetary relief against a defendant, and reduce or even prevent the filing of frivolous litigation designed to harass or vex the named defendant, as well as prevent subjecting the defendant to the range of discovery provisions in a civil case.

The threshold issue before this Court is whether the PLRA was intended to apply solely to civil actions for monetary damages or injunctive relief, or had a very broad scope of applying to writs, including writs of habeas corpus, that have as their purpose challenges to judgment and sentence. Relator contends that the purpose of the PLRA was to stem the tide of frivolous inmate litigation seeking primarily monetary damages against correctional officials and other named defendants. It should not have, as its purpose, chilling the filing of challenges to judgment and sentence by incarcerated citizens. Yet, if an incarcerated person is compelled to choose between filing a petition for habeas relief and forfeiting their very limited inmate treasuring account funds, proceeds of which go to toiletries

and other necessities, it not only "chills" filing of valid habeas challenges, but runs the risk of essentially suspending the privilege of Writ of Habeas Corpus, contrary to Article I, Section 12 of the Missouri Constitution.

The PLRA places an incarcerated plaintiff seeking to file a civil action for monetary damages or other injunctive relief in a similar posture to a non-incarcerated plaintiff. All persons seeking redress in court pay a filing fee to bring the defendant to answer their complaints in court. The defendant, in addition to being subjected to the burden of answering plaintiff's complaint, also is subjected to potentially taxing discovery procedures, including, inter alia, written interrogatories, Rule 57.01(a), written deposition questions, Rule 57.04(a), and request for admissions, Rule 59.01(a). By requiring a filing fee under the PLRA, the unsuccessful plaintiff is treated like a non-incarcerated litigant, and must decide whether their limited resources are wisely spent pursuing litigation, with the idea that frivolous litigation will be reduced because the incarcerated plaintiff will not wish to expend valued resources on frivolous pleadings. In this Court's decision of *State ex rel. Scott v. Roper*, 680 S.W.2d 757 (Mo. banc 1985), this Court concluded that a judge lacked authority to compel a private attorney to provide representation to an inmate bringing a civil action for monetary damages and a medical malpractice claim. In so ruling, the Court noted:

> In cases involving potential contingent fee claims, it is no more difficult for a poor or disadvantaged person to find a lawyer than it is for a well-to-do person. The ability to find a lawyer depends on the

> degree of merit of the claim [citations omitted]. The market, then, serves as a check on the litigation explosion facing society and the courts …

Id., at 768.

However, a challenge to judgment and sentence under habeas corpus action is different, and regardless of whether "in all particulars not provided for by the foregoing provisions, proceedings in habeas shall be governed by and conform to rules of civil procedure and the existing rules of general law upon the subject", Rule 91.01(a), this is not the type of "civil case" contemplated by the PLRA. Meritorious monetary damages cases will be rewarded by success in the award of damages; meritorious habeas actions have no such financial incentive, nor will counsel undertake representation on such cases in the hopes of a share of the recovery of a monetary judgment.

The Federal counterpart to Missouri's PLRA is embodied in 28 U.S.C. Section 1915, et. Seq. (effective April 6, 1996). Its purpose was to stem the tide of prison litigation in civil rights and prison condition cases. Congress was not concerned with habeas corpus proceedings when they enacted the PLRA. See, *Naddi v. Hill*, 106 F.3d 275, 277 (9th Cir. 1997). The *Naddi* court analyzed whether the PLRA should apply to habeas corpus cases, since they are considered civil proceedings for some purposes, and the court concluded that the PLRA did not apply to habeas actions, only actions for monetary damages or injunctive relief in civil rights cases or prison condition cases. *Id.*

Missouri's PLRA, enacted shortly after Congress's legislation, also has a similar purpose of stemming the tide of frivolous inmate litigation for monetary damages or injunctive relief against correctional officials and other defendants, by requiring inmates to determine if their limited resources should be expended in filing a civil action in an effort to prevent defendants from being forced to answer such potentially vexatious suits. A non-meritorious habeas action does not require an answer from any named defendant, nor subject a named defendant to potentially burdensome procedures, but rather can be dismissed by the court at the outset for lack of merit. Rule 91.05. On the other hand, a meritorious habeas action may not be filed if the inmate is forced to expend his very limited financial resources to do so.

The PLRA, enacted relevantly soon after Congress' effort to limit prison civil rights and condition cases, had a similar purpose to Congress. The inmate seeking monetary relief is placed in the same position as the non-incarcerated plaintiff, by paying filing fees to proceed in a quest for monetary damages against named defendants. Only an incarcerated person has a valid challenge to judgment and sentence which may be evaluated by way of writ of habeas corpus, or perhaps some other writs (declaratory judgment for jail time credit for instance, or mandamus to require a judge to file without cost a postconviction appeal, or as in the instant action, a habeas corpus action).

Wherefore, Relator contends Respondent improperly applied the PLRA so as to require Relator to incrementally pay the full filing fees of $135.00 or subject

of his habeas corpus action to dismissal, an action which solely challenges the propriety of judgment and sentence under this Court's authority of *State ex rel. Meier v. Stubblefield*, 97 S.W.3d 476 (Mo. banc 2003).

II.

A Writ of Mandamus should issue and require Respondent to direct the clerk to file the Relator's petition for Writ of Habeas Corpus in Dekalb County without requirement of payment of full filing fees under the PLRA, because Section 514.040.3 should allow Relator to proceed without paying full filing fees or other costs in that Relator is represented by the Public Defender, and an organization funded in whole by the general assembly to provide legal services to indigent persons, and Relator has been determined by the Public Defender to be eligible for its services as a poor person, and an affidavit and motion certifying Relator's indigence has been filed before Respondent.

The PLRA was enacted in 1997 by Senate Bill 56. §506.360. Subsequent to the enactment of the PLRA, the General Assembly amended § 514.040, which allows a poor person to proceed in "any suit", having "all necessary process and proceedings as in other cases, without fees, tax or charges …", by amended laws, Senate Bill 1, in 1999, creating a new subsection 3:

> Where a party is represented in a civil action by a legal aid society or a legal services or other nonprofit organization funded in whole or substantial part by moneys appropriated by the general assembly of the state of Missouri, which has as its primary purpose the furnishing of legal services to indigent persons, or by private counsel working

> on behalf of or under the auspices of such society,[2] all costs and expenses related to the prosecution of the suit may be waived without the necessity of a motion and court approval, provided that a determination has been made by such society or organization that such party is unable to pay the cost, fees, and expenses necessary to prosecute or defend the action, and that a certification that such determination has been made is filed with the clerk of the court.

It is beyond cavil that the Public Defender System is funded in whole by the state of Missouri, and acts by legislative grant under the authority of Chapter 600, and has as its sole purpose providing legal services to indigent citizens. Thus, § 514.040.3 includes the Public Defender System. Relator, who is serving a life sentence without the possibility of parole, has never had an appeal of his sentence, claiming abandonment by his trial attorney who failed to file relator's notice of appeal. Relator sought redress for this inequitable situation with the public defender, who evaluated his indigency, and found him to be indigent and eligible for services of this system. It accepted his case and certified to the motion court by filing of Exhibit 2 that the relator was indeed indigent and unable to pay the cost and fees of proceeding in the action. Exhibit 2, along with the habeas corpus

[2] The Public Defender may and frequently does contract with private counsel to provide defense services to indigent citizens charged with crimes. Section 600.042.1(10).

action displaying valid grounds for relief was filed with Dekalb County Circuit Court on April 7, 2003. See Exhibits 1 and 2.

Rather than granting relator's motion to proceed without payment of fees or costs, and in derogation of 514.040.3, respondent ordered relator to pay the full filing fee of $135.00 by docket entry of May 13, 2003. Relator's Exhibit 3. As noted recently by the Eastern District of the Court of Appeals, in *State ex rel. Wecker v. Ohmer*, 105 S.W.3d 511 (Mo. App., E.D. 2003), the respondent's ruling was clearly erroneous. In *Wecker*, an indigent person represented by Legal Services of Eastern Missouri on appeal from an action terminating parental rights, filed a certificate attesting that she was unable to pay the costs and expenses necessary to prosecute the appeal, and requested preparation of the transcript on appeal at cost to the city of St. Louis. The circuit judge denied this request, and the Eastern District issued a writ of mandamus to the judge to issue all orders necessary for Wecker to prosecute her appeal without costs, including a free transcript:

> Relator filed a Certificate which set out that she is represented by LSEM, which is funded in substantial part by moneys appropriated by the general assembly of the State of Missouri, and which also has as its primary purpose the furnishing of legal services to indigent persons. This Certificate also states that Relator is unable to pay the costs, fees, and expenses necessary to prosecute or defend that action.

* * *

> Further, Section 514.040.3 provides for the waiver of costs and fees if the legal service organization representing the party makes a determination and certifies that the party is unable to pay [citing *State ex rel. Halterman v. Patterson*, 24 S.W.3d. 784, 786 (Mo. App., E.D. 2000]. Because this statute provides that fees may be waived without court approval or motion, a court does not have jurisdiction or discretion to assess costs or fees against a party, if those actions have been taken. [citation omitted].

State ex rel. Wecker v. Ohmer, 105 S.W.3d at 513.

In construing a statute to determine legislative intent, a court must presume that the legislature acted with a full awareness and complete knowledge of the present state of the law. *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. banc 1984). Further, where two statutes are repugnant in any of their provisions, the later act, even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first. *County of Jefferson v. Quik Trip Corporation*, 912 S.W.2d 487, 490 (Mo. banc 1995).

Clearly, by enactment of § 514.040.3, the General Assembly intended those indigent persons who are determined to qualify for representation by an organization funded in whole or substantial part by the state to provide legal services to the indigent, to have access to the courts of this state without paying

fees or other costs of proceeding. To the extent that the provisions of the PLRA are contrary to 514.040.3 (which was the latter enacted statute), the PLRA must yield. The General Assembly's intent is thus served by this reasoning. Indigent clients qualified for and represented by the State Public Defender in an action, like habeas corpus,[3] to challenge judgment and sentence, may proceed without further

[3] There is an arguable equal protection problem here as well. Indigent persons confined in the county jail and who have no department of corrections treasury account to tap for the payment of fees, may not be subject to payment of filing fees under the PLRA, and thus may proceed in court in a habeas corpus action without payment of any fees. A similarly situated person incarcerated not in a county jail but rather in the department of corrections is required to pay for the costs of proceeding in their challenge to their incarceration by writ of habeas corpus. Compare *State ex rel. James v. Stamps*, 562 S.W.2d 354 (Mo. banc 1978), which noted an equal protection problem by not allowing those incarcerated in county jails to accrue good time credits similar to those accrued by a person serving a sentence in the department of corrections. However, an equal protection analysis need not be reached in this case, because Section 514.040.3 makes it very clear that an indigent person represented by the State Public Defender and who certifies to the court that they are unable to pay the costs of proceeding in the action, as relator has done by Exhibit 2 which clearly displays and certifies his

costs. Indigent inmates not represented by a state funded legal services agency, who file purely civil actions for monetary damages or perhaps injunctive relief, fall within the scope of the PLRA.

An unusual result is reached if the Public Defender is not considered subject to 514.040.3. A prisoner who has a purely civil action that obtains representation by a so-called legal aid society is entitled to proceed without further costs or fees under 514.040.3, whereas relator, who is not seeking monetary damages in a purely civil action but rather has a valid challenge to judgment and sentence, does not obtain the benefits provided by 514.040.3.

This is an anomalous result and is not what the General Assembly intended. Rather, professional organizations, legal services, or otherwise, will screen the cases for merit, weed out non-frivolous cases from the frivolous ones, and only proceed on the ones with arguable merit. This is especially the situation here, where the public defender has determined relator's habeas corpus challenge to judgment and sentence has merit under this Court's authority of *In re Meier v. Stubblefield*, 97 S.W.3d 476 (Mo. banc 2003).

It should be noted that the public defender may, in its discretion, provide services to eligible persons where it is determined appropriate, §600.042.3. The habeas action here, is much different than those involved in *State ex rel. Marshall*

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indigence to the court, must be allowed to proceed without any payment of fees or costs in his habeas corpus action.

v. Blaeuer, 709 S.W.2d 111 (Mo. banc 1986), which were actions not challenging the propriety of judgment and sentence, but rather conditions of confinement. Also, it is not uncommon for Courts of Appeals to appoint the public defender[4] in writs of habeas actions filed in their respective courts on occasion, and undersigned accepts those appointments.

Wherefore, even if the PLRA was not intended to be limited to purely civil actions for monetary damages or injunctive relief but includes in its scope challenges to judgment and sentence by writs or otherwise, where a professional organization screens a poor person's case and determines it has merit, and certifies to the court a person's eligibility for services by the organization, no fees should be required seeking redress in the courts of this state. § 514.040.3.

[4] This recently occurred in the Western District Court of Appeals, *In re State ex rel. Jerry L. Gater v. William Burgess*, No. WD 63392. The Western District clerk talked with undersigned, who agreed to provide an attorney pursuant to the Court's request to represent the client in this case, and an order appointing counsel will issue either today or on November 12.

CONCLUSION

WHEREFORE, for the reasons asserted in Point I, the legislature did not intend to include writs of habeas corpus or other challenges to judgment and sentence when it enacted the PLRA. In the alternative, and as argued in Point II, even if the PLRA applies to writs and other challenges to judgment and sentence, where the public defender determines a person is eligible for its services, certifies this to the court and undertakes representation on a writ or other such action, § 514.040.3 should apply to allow the client of the public defender to proceed without payment of filing fees or costs in the proceeding.

Respectfully submitted,

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Certificate of Compliance and Service

I, Lew Kollias, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,709 words, which does not exceed the 31,000 words allowed for relator's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in November, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 10th day of November, 2003, to Andrew Hassell, Assistant Attorney General, P.O. Box 899, Jefferson City, MO 65102 and a copy was e-mailed to opposing counsel as well.

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Lew Kollias